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SUPREME COURT, U.S.

NO. 81-6205

IN THE

UNITED STATES SUPREME COURT

OCTOBER TERM, 1981

CHARLES WILLIAM BASS,

Petitioner

V.

THE STATE OF TEXAS,

Respondent

On Petition For Writ Of Certiorari
To The Texas Court Of Criminal Appeals

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. Should this Court Review a Matter Which Was Not Properly Raised or Decided in the Court Below?

II. Does the Decision of the Court Below that Evidence Admitted in Violation of State Evidentiary Rules Was Harmless Present a Federal Constitutional Question?

III. Was Petitioner Denied an Impartial Jury by the Service of Juror Marilyn Turner?

IV. Should this Court Review a Matter to Which the State Appellate Court found that Petitioner made a Procedural Default under State Law?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
OPINION BELOW	1
JURISDICTION	1
CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED	2
STATEMENT OF FACTS	2
SUMMARY OF ARGUMENT	2
REASONS FOR DENYING THE WRIT	4
I. THE QUESTIONS PRESENTED FOR REVIEW ARE UNWORTHY OF THIS COURT'S ATTENTION	4
II. THIS COURT SHOULD REFUSE TO CONSIDER A MATTER WHICH WAS NOT PROPERLY RAISED OR DECIDED IN THE COURT BELOW	4
III. THE DECISION OF THE COURT BELOW THAT EVIDENCE ADMITTED IN VIOLATION OF STATE EVIDENTIARY RULES WAS HARMLESS IS BASED UPON NONFEDERAL GROUNDS AND PRESENTS NO CONSTITUTIONAL QUESTION	5
IV. PETITIONER WAS NOT DENIED HIS RIGHT TO AN IMPARTIAL JURY BY THE SERVICE OF JUROR MARILYN TURNER	6
V. THIS COURT SHOULD REFUSE TO CONSIDER A MATTER TO WHICH THE STATE APPELLATE COURT FOUND PETITIONER HAD MADE A PROCEDURAL DEFAULT UNDER STATE LAW	7
CONCLUSION	8

INDEX OF AUTHORITIES

Cases	Page
Boulware v. State, 542 S.W.2d 677 (Tex.Crim.App. 1976), cert. denied, 430 U.S. 959 (1977)	7
Cardinale v. Louisiana, 394 U.S. 437 (1969)	5
Chapman v. California, 384 U.S. 18	6
Davis v. United States, 411 U.S. 233 (1973)	8
Estelle v. Williams, 425 U.S. 501 (1976)	8
Henry v. Mississippi, 379 U.S. 443 (1965)	5
Lamkin, In re, 355 U.S. 59 (1957)	5
Michigan v. Tyler, 436 U.S. 499 (1978)	8
Rice v. Olson, 324 U.S. 786 (1945)	5
Street v. New York, 394 U.S. 582 (1969)	5
Tacon v. Arizona, 410 U.S. 351 (1973)	5
Witherspoon v. Illinois, 391 U.S. 510 (1968)	7,8

Statutes	
U.S. Const. amend. VI	2
U.S. Const. amend. IVX	2
28 U.S.C. §1257	1
Article 36.29, V.A.C.C.P.	7
Article 37.071, V.A.C.C.P.	2
§19.03(a)(1), V.T.C.A. Penal Code	2
Rule 17, Rules of the Supreme Court	4
Rule 11, Rules of the Texas Court of Criminal Appeals	4

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TO THE HONORABLES JUSTICES OF THE SUPREME COURT:

NOW COMES the State of Texas, Respondent herein, by and through its attorney, the Attorney General of Texas, and files this Brief in Opposition:

OPINION BELOW

The opinion of the Court of Criminal Appeals of Texas, delivered October 23, 1981, is reported at 622 S.W.2d 101 (Tex.Crim.App. 1981) and is attached to the petition as Appendix A.

JURISDICTION

Petitioner seeks to invoke the jurisdiction of this Court under the provisions of 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISIONS AND STATUTES

Petitioner bases his claims upon the Sixth and Fourteenth Amendments to the United States Constitution.

Also involved is Article 36.29, V.A.C.C.P.

STATEMENT OF FACTS

Petitioner was tried in May, 1980, for the 1979 murder in Houston, Texas, of Charles Baker, a peace officer acting in the lawful discharge of his duties. See, Sec. 19.03(a)(1), V.T.C.A. Penal Code. The record reflects that shortly after he committed an aggravated robbery, Petitioner was stopped by the deceased and another peace officer, who were attempting to serve arrest warrants. Petitioner struggled with the deceased, shot him twice with a pistol hidden in his pants, and fled to Kentucky. After fighting extradition proceedings for almost six months, Petitioner was returned to Texas. Although at trial Petitioner testified in his own behalf and claimed that he acted in self-defense, on May 29, 1980, the jury found him guilty of the capital offense. On May 30, 1980, the jury answered affirmatively the special issues submitted pursuant to Article 37.071, V.A.C.C.P. Accordingly, punishment was assessed at death.

The conviction was affirmed on September 23, 1981. On October 5, 1981, Petitioner's attorney timely filed a motion for leave to file a motion for rehearing. On October 9, 1981, sixteen days after the court's decision was handed down, Petitioner's present counsel, acting as amicus curiae, filed a motion for leave to file a motion for rehearing. On October 28, 1981, the motions for leave were denied.

SUMMARY OF THE ARGUMENT

There are no special and important reasons to review this case. Petitioner's contention that the trial court erred in denying his last-minute motion for continuance was not properly raised in the court below. As such, this issue was not reviewed by that court and review in this Court should be precluded.

Petitioner's complaint about the admission at trial of an extraneous offense presents no federal question, since it is grounded on the application of state evidentiary rules. Further, as the court below found from a review of the entire record, any error in the admission of this evidence was harmless beyond a reasonable doubt.

Petitioner has failed to show constitutional error in his contention that the trial court abused its discretion in refusing to hold disqualified a juror who had been the victim of a crime subsequent to her selection. Further, when Petitioner was given the opportunity to agree to the juror's exclusion, he refused to do so. This ground fails to raise a constitutional question.

This Court should refuse to consider Petitioner's contentions that two veniremen were erroneously excluded from his capital venire. As Petitioner correctly states, he failed to comply with the State's contemporaneous objection requirement at trial, in that he failed to make any objections to the exclusion of these veniremen until his direct appeal. As such, the state appellate court found that Petitioner had waived any complaints. Thus, this Court should decline to review these grounds.

REASONS FOR DENYING THE WRIT

I.

THE QUESTIONS PRESENTED FOR REVIEW ARE UNWORTHY OF THIS COURT'S ATTENTION

Rule 17 of the Rules of the Supreme Court provides that review on writ of certiorari is not a matter of right but of judicial discretion, and will be granted only when there are special and important reasons therefor. Petitioner has advanced no special or important reasons in this case and none exist.

II.

THE COURT SHOULD REFUSE TO CONSIDER A MATTER WHICH WAS NOT PROPERLY RAISED OR DECIDED IN THE COURT BELOW

Petitioner's contention that the trial court erred in denying his pro se motion for continuance and request to change counsel filed two days before trial was not properly presented in the court below. This contention was first made by amicus curiae in his untimely filed motion for leave to file a motion for rehearing.

The former Rules of the Court of Criminal Appeals, Rule 11, effective at the time of decision in Petitioner's case, provided that:

> Motions for rehearing may not be filed as a matter of right. Any party desiring a rehearing of any case which is initially determined by the Court En Banc must, within 15 days after the opinion is handed down, present to the Clerk a motion for rehearing. . . accompanied with a motion for leave to file. . . If as many as five members of the Court are of the tentative opinion that the motion for a rehearing should be granted in whole or in part, the motion for leave to file will be granted. . . Otherwise the motion for leave to file will be denied, and the motion for a rehearing will not be filed.

The records below are clear that the motion for leave to file a petition for rehearing by the amicus curiae was not timely filed, as more than fifteen days had elapsed since the date of decision. It is equally clear that, since the motion for leave to file was denied, the motion for rehearing was not filed or reviewed by the court below.

This Court consistently has declined to review matters which were not raised and decided in the court below. Tacon v. Arizona, 410 U.S. 351 (1973); Cardinale v. Louisiana, 394 U.S. 437 (1969). Where discussion of an issue is omitted from the lower court's opinion, as here, this Court will assume that the issue was not properly presented to that court for review, unless the aggrieved party can show otherwise. Street v. New York, 394 U.S. 582 (1969); see also, In re Lamkin, 355 U.S. 59 (1957).

In the instant case, because Petitioner failed to comply with state procedural law in presenting this contention to the appellate court, the claim was not reviewed. Accordingly, this Court should decline to review this ground not decided in the lower court.

III.

THE DECISION OF THE COURT BELOW THAT EVIDENCE ADMITTED IN VIOLATION OF STATE EVIDENTIARY RULES WAS HARMLESS IS BASED UPON NONFEDERAL GROUNDS AND PRESENTS NO CONSTITUTIONAL QUESTION

The Court of Criminal Appeals found that the evidence that Petitioner had once recklessly fired a pistol before he committed the capital offense was admitted in violation of state evidentiary rules. 622 S.W.2d at 104. No federal constitutional question was urged in the court below, and none was decided by that court.

This Court has declined to review matters of state law or judgments of state courts which rest on independent state grounds. Henry v. Mississippi, 379 U.S. 443 (1965); Rice v. Olson, 324 U.S. 786 (1945). Clearly, Petitioner is challenging the application of state evidentiary rules, which presents no federal constitutional questions.

Even if a constitutional question were presented, the state court, in reviewing Petitioner's complaint about the admission of evidence that he once recklessly fired a pistol, stated:

> In the instant case, evidence of appellant's guilt was overwhelming. McCammon saw appellant and Baker struggling before Baker was shot. Appellant admitted that he

> shot Baker when the officer was directly behind him. The medical examiner testified that the skin contact wound to the victim's stomach would have resulted in death within three to five minutes. The extraneous offenses of the aggravated robbery at Shirlee's Lounge and the attempted capital murder of McCammon were admitted without objection. Both offenses are first degree felonies. While testifying, appellant stated that he had been arrested on eight or nine previous occasions.
>
> We conclude that in view of the other evidence presented at trial, there is not a reasonable probability that the complained of misdemeanor extraneous offense might have contributed to appellant's conviction or had any effect upon punishment assessed. No reversible error is shown.

622 S.W.2d at 104. Thus, in light of the entire record and other evidence adduced at trial, it is clear that the admission of this evidence was harmless beyond a reasonable doubt. See, Chapman v. California, 384 U.S. 18, 87 S.Ct. 824 (1967).

IV.

PETITIONER WAS NOT DENIED HIS RIGHT TO AN IMPARTIAL JURY BY THE SERVICE OF JUROR MARILYN TURNER

The record reflects that well after the completion of the lengthy jury selection procedures, one juror, Marilyn Turner, approached the trial court and reported that she recently had been the victim of a crime and was concerned about her impartiality (SF 2452). A hearing was held by the court, at which time Turner stated that although she was upset and had trouble concentrating, she was "willing to do [her] civic duty" and would do her best to follow the court's instructions (SF 2583, 2584, 2591).

Petitioner objected to the discharge of this juror and selection of another unless he were given a number of additional peremptory strikes equal to those which the state had remaining at the conclusion of voir dire proceedings (SF 2585-2589). Thus, when given the opportunity to agree to her dismissal, Petitioner declined to do so.

The Court of Criminal Appeals found that the issue was whether the trial court abused its discretion in declining to hold Turner "disabled" from service pursuant to Article 36.29, V.A.C.C.P., and stated:

> In the instant case, Turner was understandably upset at the time of the hearing. She indicated that she was having difficulty in concentrating and was at times nauseous. On the other hand, she stated that she was willing to do her "civic duty" and would do "the best [she] could" while serving on the jury. Appellant did not question Turner at the time he sought to have the court discharge her as disabled. Further, there was no evidence offered at the hearing on appellant's motion for new trial with regard to the effect, if any, which the incident had on Turner's verdict at either phase of the trial or any difficulty she may have had as serving as a juror.
>
> In determining whether the court abused its discretion in failing to discharge Turner as disabled, this Court has been provided with nothing more than a cold record. However, at the time of the hearing, the trial court, in determining the issue, had the opportunity to observe Turner's demeanor and listen to the tone of her voice. Based upon this record, we cannot conclude the court abused its discretion in refusing to discharge Turner as disabled from sitting on the jury.

622 S.W.2d 101. This court should decline to review the trial court's exercise of discretion.

V.

THIS COURT SHOULD REFUSE TO CONSIDER A MATTER TO WHICH THE STATE APPELLATE COURT FOUND PETITIONER HAD MADE A PROCEDURAL DEFAULT UNDER STATE LAW

Petitioner contends that veniremen Mildred Spensley and Marian Hall were excluded for cause in violation of the doctrine of Witherspoon v. Illinois, 391 U.S. 510 (1968). When these contentions were presented to the state appellate court, that court held that Petitioner had waived review of these grounds, as he failed to make contemporaneous objection on those grounds at trial as was required by state procedural law in effect at the time of Petitioner's trial. See, Boulware v. State, 542 S.W.2d 677 (Tex.Crim.App. 1976), cert. denied, 430 U.S. 959 (1977).

This Court consistently has declined to review matters to which no proper objection was made at trial in compliance with state procedural requirements. The failure of a defendant to present a federal question in conformance with state procedure constitutes an adequate and independent ground of decision barring review in this Court. Michigan v. Tyler, 436 U.S. 499 n.7 (1978). That the state has a legitimate interest in requiring the parties to apprise the trial court of their grounds for complaint is well settled. See, e.g., Wainwright v. Sykes, 433 U.S. 72 (1977); Estelle v. Williams, 425 U.S. 501 (1976); Davis v. United States, 411 U.S. 233 (1973). The state's legitimate interest in this procedural rule is evident in the instant case where, if Petitioner believed that the doctrine of Witherspoon was violated or he did not want the veniremen excluded, he should have apprised the trial court, giving that court an opportunity to remedy any defect before the completion of the entire voir dire and trial on the merits. Having failed to do so, Petitioner is precluded from review of this ground.

WHEREFORE, PREMISES CONSIDERED, Respondent respectfully prays that the petition for certiorari be denied.

Respectfully submitted,

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